Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Accelerating Wireline Broadband	)	WC Docket No. 17-84
Deployment by Removing Barriers	)	
to Infrastructure Investment	)	

To the Commission:

COMMENTS OF ILLINOIS ELECTRIC COOPERATIVE

Illinois Electric Cooperative ("IEC") hereby submits comments in response to the Federal Communications Commission's ("FCC") Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, adopted April 20, 2017, and released April 21, 2017, concerning the acceleration of wireline broadband deployment.

INTRODUCTION

The FCC recognizes that "high-speed broadband is an increasingly important gateway to jobs, health care, education, information, and economic development. Access to high-speed broadband creates economic opportunity, enabling entrepreneurs to create businesses, immediately reach customers throughout the world, and revolutionize entire industries."[1] Accordingly, the FCC, through this proceeding, proposes and seeks comment on a number of actions designed to accelerate the deployment of next-generation networks and services by removing barriers to infrastructure investment.

[1] FCC Docket WC 17-84, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, FCC-CIRC1704-2 ¶1 at p2, March 30, 2017.

IEC BACKGROUND

IEC was organized in May of 1936 as Illinois Rural Electric Company to provide electric service to rural areas. The first electric lines in IEC's territory were energized in 1938. IEC's headquarters is centrally located in the heart of its service territory in Winchester, Illinois, serving members in the Illinois counties of Morgan, Pike, Scott, Greene, and Calhoun, with a few members located in the adjacent counties of Adams, Brown, Cass, Jersey, and Macoupin. IEC supplies electricity and provides internet service to over 14,000 accounts, one-third of which are internet accounts. IEC is registered with the Illinois Commerce Commission ("ICC") to provide interconnected Voice over Internet Protocol ("VoIP") service and successfully completed a key ICC Digital Divide Elimination Infrastructure Fund project.[2] Additionally, IEC holds certification as an Illinois local and interexchange telecommunications carrier,[3] statewide authorization to provide cable and video service,[4] and an FCC license to construct and operate cellular radio towers in Illinois.[5] IEC participated in the preliminary stages of the FCC's Broadband Experiment and carries designation as an Eligible Telecommunications Carrier.[6]

IEC has substantial experience in building, maintaining, and upgrading utility infrastructure. Its investments in internet and electric facilities range between $6 and $8 million annually. Accordingly, IEC is fully able to manage, build, maintain, and repair infrastructure for the next generation of telecommunications services. IEC offers phone

[2] ICC Docket No. 06-0187, Order entered September 19, 2006.
[3] ICC Docket No. 15-0529, Order entered December 9, 2015.
[4] ICC Docket No. 15-0170, Notice issued March 26, 2015.
[5] FCC FRN #000482189. IEC federal registration to construct and operate cellular radio towers.
[6] ICC Docket No. 16-0191, Order entered March 22, 2017.

service and internet over its own fiber-to-the-premises ("FTTP") networks in small areas of its service territory.[7] IEC also offers fixed wireless internet service over its broadband wireless network. Its fixed wireless infrastructure provides internet service from over 80 structures at speeds of up to 35 megabits per second.

IEC has a proven track record of providing high-speed broadband and affordable internet access to the communities it serves. Further, IEC seeks to continue, on a not-for-profit cooperative basis, its investments in such infrastructure and provide the opportunity for all stakeholders in its communities to benefit from such investments. IEC also believes that if it did not provide broadband internet service, it simply would not be available in many parts of its service territory.

THE FCC'S REQUEST FOR COMMENT

IEC appreciates the FCC's request for comment and will directly respond to the FCC's policies regarding access to high-speed broadband and more affordable and available internet access. Further, IEC will respond to the FCC's Notice of Inquiry to prohibit state and local laws inhibiting broadband deployment.

FCC Policies

IEC knows well that the FCC's assertions regarding the increasing importance and benefits associated with access to high-speed broadband are correct. IEC has firsthand knowledge of the benefits to school districts, businesses, and homes brought by its broadband service. Consistent with both FCC policy and IEC experience, IEC continues to see an increasing importance to serve unserved and underserved communities. The

[7] IEC provides services through its "own" network facilities as defined pursuant to the *First Report and Order* (FCC 97-157, CC Docket No. 96-45) ¶ 159.

FCC's policy provides proper context to this proceeding in that it is entirely consistent with well-established Illinois[8] and national broadband policy.[9]

Notice of Inquiry Prohibiting State and Local Laws Inhibiting Broadband Deployment

IEC welcomes this opportunity to provide comments on whether the FCC should enact rules, consistent with its authority under Section 253 of the Telecommunications Act of 1996 ("TA96") 47 U.S.C. 151 et seq., to promote the deployment of broadband infrastructure by preempting state and local laws that inhibit broadband deployment. Section 253(a), which generally prohibits state and local regulations that "may prohibit or have the effect of prohibiting" the provisioning of interstate or intrastate telecommunications services, provides the FCC with "a rule of preemption" that articulates a reasonably broad limitation on state and local governments' authority to regulate telecommunications providers. Section 253(b) provides exceptions for state and local legal requirements that are competitively neutral, consistent with Section 254 of TA96, and necessary to preserve and advance universal service. Section 253(c) provides another exception described as a "safe harbor functioning as an affirmative defense" which "limits the ability of state and local governments to regulate their rights-of-way or charge 'fair and reasonable compensation'." Under Section 253(d), Congress directed

[8] Executive Order 9 (2005) Establishment of the Illinois Broadband Deployment Council.

[9] Statement of Commissioner Ajit Pai Re: Technology Transitions, GN Docket No. 13-5; AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition, GN Docket No. 12-353; Connect America Fund, WC Docket No. 10-90; Structure and Practices of the Video Relay Service Program, CG Docket No. 10-51; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, CG Docket No. 03-123; Numbering Policies for Modern Communications, WC Docket No. 13-97. Final paragraph at p.2 (January 31, 2014).

the FCC to preempt the enforcement of any legal requirement which violates 253(a) or 253(b) "after notice and an opportunity for public comment."[10]

The FCC seeks further comment on a number of specific areas where it could utilize its authority under Section 253 to enact rules to prevent states and localities from enforcing laws that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." The FCC expressed a willingness to consider several issues, including adopting rules prohibiting excessive fees and other costs that may have the effect of prohibiting the provision of telecommunications service.

IEC's Response to the FCC

As background, in most of the rural areas of IEC's service territory and in many of the small towns, there are no public utility rights-of-way. The absence of public utility rights-of-way is, we believe, common throughout rural America and common in many small towns. Government bodies simply do not own the land, but rather only hold easements for the roads, and they cannot, therefore, grant an easement for public utilities. And unlike the practice in some other areas of the country, IEC does not share use of its poles with a telephone company. Consequently, in order to finance the construction of infrastructure like FTTP, IEC and others need easements from property owners, some of whom live hundreds of miles from the parcel on which IEC needs an easement.

Since 2014, IEC has been working toward deploying broadband via FTTP in a

[10] FCC Docket WC 17-84, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, (FCC 17-37) ¶100 at p.31, Released April 21, 2017. Also see 47 U.S.C. § 253(a)-(c).

rural high-cost county within its service territory where the topography is not suitable for line of sight fixed wireless technology. IEC's deployment plan includes installing fiber on existing electric distribution utility poles in the area to be served. The problem is that many of the old easements that permitted the installation of the electric distribution utility poles do not authorize the use of the easements for telecommunications purposes. Therefore, because telecommunication uses were not contemplated when the easement agreements were entered into several decades ago, IEC must now acquire additional easements to provide for the installation of fiber on existing poles, imposing only a nominal additional burden on the parcels.

In all, IEC needs approximately 3,000 easements, and it has received roughly half with the compensation for the landowner being installation of a fiber service drop at no cost to the landowner. Despite repeated efforts, however, multiple landowners have not responded to IEC's requests for easements. IEC's only recourse is to seek to condemn the desired easements under the Illinois Eminent Domain Act, 735 ILCS 30/1-1-1 et seq. Processing such condemnation cases will delay IEC's project. Furthermore, how much value the local trial court will assign to the easement IEC needs on numerous parcels to deploy broadband services introduces significant risk to the project.

In other words, while the easement impact on each parcel is nominal, IEC cannot accurately estimate what it might be required to pay for the necessary easements. Total project costs could therefore exceed budget expectations, and thereby kill the project. Because IEC's broadband deployment project in the rural high-cost county is dependent on Universal Service Support, the entire project could be jeopardized by cost escalations related to the nominal burden of hanging fiber on existing utility poles.

To address this situation, IEC proposes a solution that recognizes landowners' property interests and right to compensation while balancing the limited additional burden created by the new easements in IEC's situation. By way of background, IEC observes that 47 U.S.C. 542 provides that cable operator annual franchise fees shall not exceed 5% of the operator's gross revenue in a 12-month period. IEC proposes that the FCC consider imposing in condemnation proceedings an analogous cap on the value of easements that only permit the installation/attachment of fiber and other broadband enabling facilities on existing utility poles. (This valuation would be independent and apart from the FCC's pole attachment rules pertaining to the relationship between the attacher and the utility owning the pole.) Uncertainty would be overcome, and the likelihood of a successful broadband deployment significantly increases. Entities deploying broadband would also not have to rely on offering a fiber service drop without charge to compensate landowners for providing an easement.

Furthermore, by knowing the maximum potential compensation ahead of time based on FCC rules, a telecommunications carrier in IEC's position and landowners facing the simple addition of a fiber cable to existing poles could essentially eliminate the need for an actual condemnation proceeding in court. In other words, as long as the carrier has the authority to condemn such a limited easement under state law for the public purpose of deploying broadband, the primary issue to be resolved by a trial court would be the compensation to be paid for the easement. If, for example, the value is set at a percentage of some amount (such as annual revenue), the amount to pay for any particular easement will be the product of a simple formula that can be agreed to by the carrier and landowner without the involvement of a court.

Regardless of how the value of the total compensation cap is determined, how it is allocated among affected landowners will need to be determined via rule in order maximize the benefit of any such methodology. In other words, there is more than one way to allocate the aggregate amount among landowners whose property is crossed. Without a defined way to allocate the total available compensation, landowners may still argue for a larger portion of the total compensation amount, which may still lead the parties to court in a condemnation action.

Admittedly, questions of land access and land restoration following a FTTP installation project could still be raised by a landowner. But given the circumstances contemplated by IEC (i.e.: the electric easement and poles already exist), access paths should already be established and land disturbance will be minimal. The FCC could conceivably condition use of the proposed easement valuation methodology on the carrier committing in an easement agreement to restoring land to the condition it was found in.

IEC acknowledges that its proposal to cap compensation based on an FCC rule and formula will not solve all of the problems that IEC has encountered in its own rural broadband deployment project. Specifically, knowing the amount of compensation for an easement on a particular parcel will not remedy a situation when a landowner simply refuses to respond to requests for an easement. In that situation, the telecommunications carrier will still likely need to go to court to condemn an easement so that it may hang fiber on existing poles.

To be clear, IEC does not suggest that a cap for easements facilitating broadband deployment is appropriate in all instances. Clearly it may be necessary in

some situations to acquire an easement on a parcel previously untouched by a utility easement. In such situations, the condemnation of an easement for broadband deployment will involve the installation of new poles and/or boring of conduit. This represents a more significant burden on landowners than simply adding a cable to existing poles and warrants further consideration of the impact on each parcel.

The FCC's Authority Under Section 253 of TA96

As indicated above, Section 253(d) of TA96, permits the FCC to preempt the enforcement of any State or local government laws or regulations that prohibit or have the effect of prohibiting telecommunications service. Section 253(d) reads as:

> (d) Preemption
>
> If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

In practice, preemption under Section 253(d) has been considered by the FCC on a case by case basis. IEC also acknowledges that it is not aware of the FCC, or any Federal or State court, addressing preemption under Section 253(d) on a broader proactive basis.

IEC submits, however, that the absence of a proactive approach to preemption should not mean that the FCC should not consider an easement compensation cap as proposed above in a rulemaking incorporating notice and an opportunity for public

comment. The circumstances triggering the availability of the cap (i.e.: hanging broadband facilities on existing poles on existing electric easements) are sufficiently defined to lend themselves to rule language. The nature of the intrusion on the privately-owned parcels is also sufficiently nominal to warrant a prescribed compensation cap. Although adopted prior to the TA96, the Supreme Court's decision in *Loretto v. Teleprompter Manhattan CATV Corp.* clearly reflects the notion that the extent of the intrusion is a factor in determining the compensation. ("Once the fact of occupation is shown, of course, a court should consider the *extent* of the occupation as one relevant factor in determining the compensation due." *Loretto v. Teleprompter Manhattan Catv Corp.*, 458 U.S. 419, 437, 102 S. Ct. 3164, 3177 (1982))

In the context of Illinois law that would be preempted under IEC's proposal, those provisions of the Eminent Domain Act and associated caselaw relating to valuation in condemnation actions would be set aside when the right circumstances arose. In the absence of the circumstances discussed above, Illinois' Eminent Domain Act and related case law would remain in full force and effect.

IEC strongly urges the FCC to employ its authority under Section 253(d) of TA96 to preempt the value setting provisions in existing state condemnation statutes to facilitate the deployment of broadband.

CONCLUSION

IEC respectfully requests that the FCC consider using preemption to remove the uncertainty regarding the value that state courts may assign to nominal impact easements (e.g. an easement allowing fiber to be hung from existing utility poles) which frustrates, delays and jeopardizes broadband deployment projects throughout rural America.

Dated: June 9, 2017

Respectfully Submitted,

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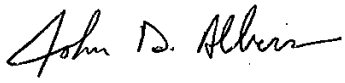

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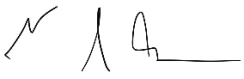

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